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No. 91-1047

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In The Supreme Court
OF THE
United States

OCTOBER TERM, 1991

THE HOSPITAL AUTHORITY OF
GWINNETT COUNTY, GEORGIA,
Individually and d/b/a
GWINNETT AMBULANCE SERVICES,
Petitioner,

v.

R. STANFORD JONES, Administrator of the Estate
of WILLIAM HAROLD O'KELLEY, Deceased,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Georgia

REPLY BRIEF FOR THE PETITIONER

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Respondent would have the Court focus on the second Question Presented by Petitioner rather than on the first, namely, whether the Supreme Court of Georgia has complied with the mandate of this Court to reconsider its decision in light of *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. (1991). It is clear that the Georgia court did not comply with that mandate; it plainly said it disagreed with this Court's *Haslip* decision (A. 2-4). Even so, the Court has jurisdiction of and should, we submit, consider both Questions Presented.

Status of Proceedings

In the appearance last year of this case, *Hospital Authority of Gwinnett County, Georgia v. Stanford Jones*, No. 89-1315, 499 U.S. (1991), Petitioner raised, *inter alia*, the question of whether O.C.G.A. (Official Code of Georgia Annotated) § 51-12-5 authorizing punitive damages violated Petitioner's rights to due process and equal protection.

Following decision of *Pacific Mutual Life Ins. Co. v. Haslip, supra*, the Court remanded this case for further consideration in light of *Haslip*. The Georgia Supreme Court nevertheless reaffirmed the punitive damage award (A. 1-5). The editors of U.S. Law Week characterized the Georgia decision as follows: "Georgia Court Gives Slight Regard to *Haslip* Punitive Damages Guidelines". 60 U.S.L.W. 1070 (1991).[1] (The Supreme Court of Appeals of West Virginia has disagreed with Georgia's interpretation of *Haslip*, saying: "We believe that *Haslip* offers more than mere platitudes...." *Fleming Landfill, Inc. v. Garnes*, 1991 W.Va. Lexis 215, S.E.2d (1991).)

Jurisdiction

In the Brief in Opposition (pp. 1-3), Respondent argues, without citation of authority, that when the Court remanded this case to the Georgia court for further consideration in light of *Haslip*, the Court lost jurisdiction of the due process and equal protection challenges to O.C.G.A. § 51-12-5 raised in Petitioner's earlier Petition for Certiorari, *Hospital Authority of Gwinnett County, Georgia v. Jones*, No. 89-1315, *supra*, which issues now appear as the second of the pending Questions Presented.

Respondent urges as the reason for adopting such a rule that the state courts should first be afforded an opportunity to consider federal questions (Brief in Oppo-

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[1] Even Respondent recognizes that the Supreme Court of Georgia found *Haslip* "to have little utility". Brief in Opposition, p. 18.

sition, p. 3, n. 5). The Georgia Supreme Court has been afforded such opportunity and has held, erroneously we submit, O.C.G.A. § 51-12-5 to be constitutional (A. 12-17). The supposed reason for the rule advocated by Respondent fails to justify such a rule.[2]

Petitioner respectfully submits, albeit also without direct authority, that, following remand, reconsideration, reaffirmance and renewal of a Petition for Certiorari, so long as the Court can deny certiorari of renewed grounds there is no reason for the Court to declare itself to be without jurisdiction of issues raised earlier and not decided by the Court when it granted certiorari and remanded for reconsideration. Compare *Hathorn v. Lovorn*, 457 U.S. 255, 261-262 (1982).

In the case at bar there are numerous valid reasons for the Court to consider those punitive damages issues raised in this case earlier and not decided by *Haslip*. Therefore, Respondent's effort to restrict the Court's power of review should not be allowed to succeed.

Statement of the Case

Respondent argues that punitive damages were authorized here because Petitioner's parking lot was unsafe for helicopter landings (Brief in Opposition, pp. 5, 6, 12, n. 21). An unsafe landing area would at least have provided a proximate cause for the helicopter crash (see the Georgia court's "but for" analysis at A. 11). However, the Georgia Supreme Court expressly refused to justify the award of punitive damages on this basis (A. 11, n. 7). Respondent's efforts to sustain the award on this rejected

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[2] Respondent also makes a waiver argument (Brief in Opposition, pp. 2-3, 14) because Petitioner did not attempt to reargue the invalidity of O.C.G.A. § 51-12-5 on remand. The Georgia court would have "come over the bench" had we attempted to reargue matters it had previously decided (A. 12-17) and which this Court did not remand.

"inadequate heliport" basis should not be allowed to prevail.

Argument

Respondent urges that Petitioner failed to offer evidence showing excessiveness (Brief in Opposition, pp. 6-9), but this contention hides two fallacies. First, the Supreme Court of Georgia did not, upon remand, itself remand to the trial court for hearing and the presentation of evidence as to excessiveness in light of the factors set forth in *Haslip*. Instead, it found that, notwithstanding *Haslip*, post trial review of punitive damages by trial and appellate courts "would be entirely a matter of conjecture" or of "opinion based upon extraneous factors" (A. 4).

Second, Respondent is arguing that the burden of limiting punitive damages is on the defendant (Petitioner here) (Brief in Opposition, p. 11, n. 16). On the contrary, like entitlement, the burden of proving the amount of recoverable punitive damages is on the plaintiff (Respondent here), as is true for all other damages.

Respondent's reliance upon a supposed "scienter requirement" (Brief in Opposition, pp. 11, 14) to supply notice of the prohibited conduct is misplaced on its face, just as was the Georgia court's reliance thereon (A. 13). There is no scienter requirement in showing an "entire want of care", the basis on which punitive damages were awarded here (A. 13).

Respondent urges that Georgia has detailed standards governing awards of punitive damages comparable to the *Green Oil* standards applicable in Alabama. *Haslip*, 111 S.Ct. at 1045 (Brief in Opposition, pp. 9-10, 14-15). To support this argument, Respondent cites a suggested jury instruction first recommended by the Georgia court in this very case (A. 14-15, n. 13) which had not been given in charge by the trial court (A. 33-34) and which instruc-

tion was not used by the Supreme Court of Georgia in upholding the punitive damages award entered here.

The fact of the matter is that the Supreme Court of Georgia continues to accord unjustifiable deference to excessive verdicts unless the award is so excessive as to "shock the judicial conscience" (A. 17). Compare the similar Mississippi standard criticized in *Pacific Mutual Life v. Haslip, supra*, 111 S.Ct. 1032, 1045, n. 10.

Conclusion

Respondent asserts that ". . . in fixing the award of punitive damages, the jury in this case was authorized to evaluate not only the harm actually inflicted by the Petitioner [which was, at most, "nominal"], but also the gravity of the risks created by Petitioner's misconduct." Brief in Opposition, p. 6 (matter in brackets added). That is the issue being raised, because in *Haslip* the Court held that punitive damages must ". . . have some understandable relationship to compensatory damages," 111 S.Ct. at 1045, not a relationship to "likely harm" as in Alabama, 111 S.Ct. at 1045. Let the helicopter occupants injured in the crash collect punitive damages if allowable, not someone who suffered no injury.

Here, Mr. O'Kelley, who was "only slightly injured" in the crash (A. 8), was awarded nominal damages, plus $1.3 million in punitive damages. That award should have been disallowed by the Georgia courts. *Haslip, supra.* A jury's evaluation of "likely harm" creates no standard at all. Respondent may consider this approach "cold" (Brief in Opposition, pp. 6-7, n. 9), but it is the law, *Haslip, supra,* which the Supreme Court of Georgia chose not to

apply. The petition for certiorari should, we submit, be granted.

February 14, 1992

Respectfully submitted,

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